

**Permata Merchant Bank Berhad v.
Glove Seal Sdn. Bhd. & 3 Ors.**

[1994] 1 CLJ

Dr. Zakaria M. Yatim J.

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PERMATA MERCHANT BANK BERHAD

v.

GLOVE SEAL SDN. BHD. & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA M. YATIM J.
[CIVIL SUIT NO. D4-22-1589-90]
7 SEPTEMBER 1993

GUARANTEES: Final judgment entered against guarantors for payment of debts due and owing to Bank - Appeal - Fixed term loan facility and revolving credit facility - Whether there had been substitution of the old contract - Whether Bank had been unreasonable and impeded borrower from reducing its liabilities - Whether Bank had to exhaust other remedies before embarking on the action based on the guarantee agreement.

The plaintiff had offered a term loan facility and a revolving credit facility to the 1st defendant which were duly accepted. The 2nd, 3rd and 4th defendants who were directors of the 1st defendant guaranteed as principal debtors the repayment of all sums due and owing by the 1st defendant to the plaintiff.

Plaintiff applied for summary judgment and was successful before the SAR. The defendants appealed to the High Court contending that there were 3 triable issues in that:

- (1) the contract between the plaintiff and the defendant had been extinguished by a fresh contract evidenced in 2 letters, one respecting the term loan facility and another respecting the revolving credit facility both dated 10 October 1989;
- (2) the plaintiff had refused a request by the defendant to sell plant machinery equipment in order to reduce their liabilities to the plaintiff;
- (3) the 1st defendant had obtained an interlocutory judgment for a sum of RM800,000 against a third party. The plaintiff was bound by law to exhaust their remedies under the debenture by recovering the proceeds from the judgment before proceeding to sue on the guarantee executed by the defendants.

Held:

[1] The letter dated 10 October 1989 respecting the revolving credit facility was intended to be a new agreement. Although the letter used the word 'renewal', Clause 20 of the letter stated that acceptance of the offer would be effected by

a the delivery of the joint and several guarantees to be executed by the 2nd, 3rd and 4th defendants. However, as no fresh guarantees were in fact executed, there was no acceptance of the new offer and the letter cannot be viewed as a new contract.

b [2] The second letter dated 10 October 1989 regarding the term loan facility was merely restructuring the instalment payments which the borrower was obliged to have paid under the original facility. The letter does not constitute a new contract to substitute the original.

c [3] The clauses in the original guarantee executed by the defendants clearly show that they were not discharged or released by the restructuring of the mode of repayment of the loan by instalments and that they were still bound by the guarantee.

d [4] The plaintiff had given an explanation as to its refusal to allow the subsequent sale of plant machinery, stating that sales proceeds must be strictly applied towards settlement of the principal and not settlement of the overdue interest, which was the defendant's intentions as to the proposed sale. The plaintiff was thus justified in refusing to consent to the sale of the machinery assets.

[5] The plaintiff owed no duty to the guarantors as to how it dealt with the other securities.

[Appeal dismissed with costs].

f **Case referred to:**
China & South Sea Bank Ltd. v. Tan Soon Gin (Alias George Tan) [1990] 2 WLR 56 (foll)

Legislation referred to:
Contracts Act 1950, s. 63

g *For the plaintiffs - Robert Lazar (Shanti with him); M/s. Shearn Delmore & Co.*
For the defendants - Manjit Singh (David Morais with him); M/s. Sri Ram & Co.

JUDGMENT

Dr. Zakaria M. Yatim J:

h This is an appeal by the four defendants against the decision of the Senior Assistant Registrar who ordered that summary judgment be entered against them for a sum of RM586,237.77 together with interest thereon at the rate of 3% per annum above the plaintiff's effective costs of funds from 30 August 1990 to the date of full and final repayment.

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By a letter dated 9 September 1988 the plaintiff offered to the first defendant a term loan in the sum of RM1,100,000 and a revolving credit facility up to the limit of RM400,000. The terms and conditions of the letter of offer were duly accepted by the first defendant. By a guarantee in writing dated 25 November 1988, the second, third and fourth defendants agreed to guarantee as principal debtors the repayment to the plaintiff by the first defendant of all monies due and owing to the plaintiff.

The plaintiff's claim is from the remaining sum of RM586,237.77 which is still due and owing to the plaintiff together with interests thereon at the rate of 3% per annum above the plaintiff's effective costs of funds from 30 August 1990 to date of final repayment.

At the hearing of the appeal, Mr. Manjit Singh, Counsel for the defendants raised three points to show that there were triable issues in this case.

On the first point he contended that the contract as contained in the letter of offer dated 9 September 1988 had been extinguished by a fresh contract contained in two letters dated 10 October 1989. The two letters he referred to were letters written by the plaintiff to the first defendant. The first letter (exhibit YCS -28 - enclosure 5) was in respect of a revolving credit facility of RM400,000 granted by the plaintiff to the defendant. The second letter was in respect of a term loan facility of RM1,100,000 granted by the plaintiff to the defendant. He contended that two letters dated 10 October 1989 constituted a new contract which substituted the earlier contract. He said that the earlier contract had been extinguished and the defendants were released from performing that contract. Accordingly, he said, the second, third and fourth defendants had been discharged of their earlier guarantees. He relied on s. 63 of the Contracts Act 1950, which states that:

If the parties to a contract agree to substitute a new contract from it, or to ... or alter it, the original contract need not be performed.

He said that the issue was an issue of law and fact, that is whether the letters dated 10 October constituted a fresh contract. He submitted that this was a triable issue.

Mr. Robert Lazar, Counsel for the plaintiff submitted that the letter dated 10 October 1989 on the revolving credit facility of RM400,000 did

a not constitute a new agreement. He said that this letter merely provided for the renewal of the earlier facility.

b He next referred to the other letter dated 10 October 1989 in respect of the term loan facility of RM1,100,000. He submitted that in this letter, the plaintiff did not grant the first defendant a new facility. According to him the letter only provided for a restructuring of the instalments which the borrower was obliged to have paid under the original facility. He said that there was nothing in the letter stating that the directors whose names were mentioned and who had furnished the initial guarantees were required to furnish fresh guarantees. According to him the letter was addressed to the borrower and not to the guarantors. He argued that the guarantors could only be discharged under the terms of the guarantee which they had executed and the terms clearly stated that they could only be discharged upon full payment of the principal sum. He said that even if the security arrangement had been restructured the guarantors were not released by reason of such restructuring. He denied however that there was any restructuring of the security arrangement in the present case. He said that there was no new facility granted. What was allowed was a restructuring of the dates of the repayment of the term loan granted earlier. He added that even if the letter dealt with the restructuring of the security arrangement, the guarantors were not discharged by reason of s. 4.10 of the guarantee agreement.

f In order to consider the first point raised by Mr. Manjit Singh, it is necessary to examine the relevant documents.

g Under the letter of offer dated 9 September 1988 which was duly accepted by the first defendant, the plaintiff granted the first defendant a term loan facility of RM1,100,000 and a revolving credit facility of RM400,000. The term loan facility was for a period of three years with an initial grace period of six months from the date of the first drawdown and thereafter it would be repayable by ten equal quarterly instalments of RM110,000 each over the next 2½ years immediately following the expiry of the six months grace period. The revolving credit facility would be renewed annually subject to satisfactory annual review. The plaintiff had the right to recall the facility at any time at its absolute discretion. The letter also contained provisions

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relating to interest rates to be charged by the plaintiff in respect of the term loan facility and the revolving credit facility. The letter further stated that if default was made in the payment of the principal or interest or if there was any breach of the terms and conditions of the facilities, the total principal outstanding and all interest thereon would be repayable upon demand. As security for the facilities, the first defendant was required to comply with the following terms:

- a. A debenture incorporating a first fixed and floating charge over the entire assets both present and future of the Borrower.
- b. An irrevocable and unconditional Standby Letter of Credit from Middle East Bank Ltd. (Dubai) in New York (to be provided by the foreign shareholder/Director) for 20% of the outstanding liabilities, the amount of which would be proportionately reduced as the sum owing decreases.
- c. A joint and several guarantee by the local Directors *viz.*,
 - i. Tunku Shahabuddin bin Tunku Besar Burhanuddin;
 - ii. Tunku Mahmud bin Tunku Besar Burhanuddin; and
 - iii. Mr. Mohan Ramalingam.

According to the affidavit of Yeoh Liew See affirmed on behalf of the first defendant on 6 March 1991, the first defendant had created a fixed and floating charge by way of a debenture against the entire assets of the first defendant. The first defendant also provided an irrevocable and unconditional stand-by letter of credit from the Middle East Bank Ltd., Dubai, New York. The directors named in the letter of offer executed a guarantee in writing on 25 November 1988. They were the second, third and fourth defendants. By way of a supplemental debenture dated 29 January 1989 variations to the earlier debenture were made and these variations were duly accepted by the second, third and fourth defendants as guarantors.

I shall now turn to the two letters dated 10 October 1989. I shall first consider the letter on revolving credit facility of RM400,000. The letter begins with the following words:

We, Permata Merchant Bank Bhd (PMBB) are pleased to confirm the renewal of the above mentioned facility subject to the following main terms and conditions ...

- a** Clause 4 of the letter required a "joint and several guarantee by the local Directors" namely, the second, third and fourth defendants.

Mr. Robert Lazar submitted that since the letter referred to the renewal of the revolving credit facility it did not constitute a new agreement.

- b** But looking at clause 20 of the letter it appears to me that the letter was intended to be a new agreement. The clause stated that "acceptance of this offer will be effected by the delivery of" *inter alia*, the security documents mentioned in clause 4 i.e. the joint and several guarantee executed by the second, third and fourth defendants. Mr. Yeoh Liew See in paragraph 2.13 of his affidavit averred that no fresh guarantee was executed by the second, third and fourth defendants.

It seems to me the acceptance requirements under clause 20 of the letter had not been complied with. In the circumstances the letter cannot be regarded as a new contract.

- d** I shall next consider the other letter dated 10 October regarding the term loan facility of RM1,100,000. In that letter the plaintiff acceded to the first defendant's request to allow the immediate encashment of the stand-by letter of credit from The Middle East Bank Ltd. (New York) to reduce the outstanding principal of RM715,525 to RM414,000 and to allow a moratorium on the repayment of the term loan for a period of nine months instead of one year. The letter went on to state:

- f** Following the reduction in limit to RM415,000 and the moratorium of 9 months on the repayment of the principal, the term loan of RM415,000 has been restructured such that it shall be for a period of 2 years, including a grace period of 9 months beginning from 31 August 1989, and thereafter payable by 5 equal quarterly instalments of RM83,000 each immediately following the expiry of the 9 months grace period as follows:

31 May 1990	RM83,000
31 August 1990	RM83,000
31 November 1990	RM83,000
28 February 1991	RM83,000
31 May 1991	RM83,000

- h** The letter went on to state that the new security arrangement would be by way of a fresh debenture incorporating a fixed and floating charge on the entire assets of the first defendant and secondly by way of a joint and several guarantee to be executed by the second, third and fourth defendants.
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It is not in dispute that no fresh debenture or guarantee was executed.

I agree with Mr. Robert Lazar that the letter dealt with the restructuring of the instalments which the borrower was obliged to have paid under the original facility. Looking at the letter as a whole, I am satisfied that it did not constitute a new contract which substituted the original contract.

Since no fresh guarantee was executed by the second, third and fourth defendants under the two letters dated 10 October 1989, the question that arises here is whether they are still bound by the terms of the original guarantee. In considering this question it is necessary to examine the original guarantee.

Section 3.01 of the guarantee provided:

In consideration of PCMB granting the facilities to the borrower and in consideration of PCMB making or continuing to make available the facilities to the borrower or making or continuing advances or otherwise giving credit or affording facilities to the borrower, the guarantors hereby jointly and severally Guarantee, as principal debtors and not merely as sureties, the repayment to PCMB by the borrower of all moneys which are now or shall from time to time or at any time hereafter be due and owing to PCMB.

Section 4.03 provided:

The guarantors shall not be discharged or released from this guarantee by any arrangement entered into or any composition accepted by PCMB modifying its rights and remedies whether with or without the assent of the guarantors or by any alteration in the obligations terms stipulations covenants and undertakings or by any forbearance whether as to payment time performance or otherwise.

Section 4.10 provided:

... the guarantors shall be liable under this guarantee as if they were the principal debtors ... and accordingly the guarantors shall not be discharged nor shall any of their liabilities hereunder be affected ... by any amendment to the structure or nature of the facilities or to the debenture or to any of the security documents or to any security or other guarantee and indemnity pertaining to the facilities...

From the clauses quoted above, it is clear that the guarantors were not discharged or released

a by the restructuring of the mode of repayment of the loan by instalments. They were not discharged or released even if the security arrangement was restructured. In my opinion the second, third and fourth defendants are still bound by the terms of the guarantee.

b The second point raised by Mr. Manjit Singh was that the plaintiff had earlier agreed to allow the first defendant to sell part of the plant machinery and assets which were the subject matter of the fixed and floating charge under the debenture. He said that over a period of time the total proceeds realised from the sale of part of the machinery was RM150,000. After realising that amount the first defendant again sought the permission of the plaintiff to sell further assets. He referred to a letter written by the first defendant to the plaintiff on 18 September 1990 in which the first defendant sought the consent of the plaintiff to sell two glove lines. He said that the plaintiff refused to give its consent to the sale. He said that the plaintiff also refused to allow the first defendant to sell the plant machinery although there was an offer to purchase it for US\$120,000.

e Mr. Manjit Singh contended that due to the refusal of the plaintiff to allow the first defendant to sell the rest of the plant machinery equipment the defendants were prevented from selling and reducing their liabilities to the plaintiff. He said that if the plaintiff had not refused to give its consent to sell the plant and equipment the defendants' liabilities would have been reduced further.

f Mr. Manjit Singh then proceeded on to the third point. He said that by a letter written by the plaintiff to the first defendant on 11 January 1991 the debenture had crystallised. The letter stated that the plaintiff had the benefit of a first floating charge on all the undertakings, properties and assets of the first defendant under the debenture. The letter also stated that the plaintiff was aware that the first defendant, had commenced legal proceedings against the Malaysian Rubber Development Corporation (MARDEC) in Kuala Lumpur Civil Suit No. D1-22-1901-89 and that the first defendant had obtained interlocutory judgment against MARDEC on 10 July 1990. In the same letter the plaintiff put the first defendant on notice that the plaintiff, pursuant to s. 5.02 of the debenture was converting the floating charge to a fixed charge in particular over the judgment obtained

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against MARDEC. Mr. Manjit Singh said that a sum of RM800,000 was payable by MARDEC to the first defendant under the judgment. He submitted that since the judgment was part of the assets of the first defendant the plaintiff was entitled to the benefits of that judgment to satisfy their claim against the first defendant. The fourth defendant, in his affidavit (enclosure 28) averred that the plaintiff was bound by law to exhaust their remedies under the debenture by recovering the proceeds from the judgment before proceeding on the guarantee against the second, third and fourth defendants.

Mr. Robert Lazar, in reply submitted that the fact that there was a debenture, and a stand-by letter of credit they did not in any way effect the validity of the guarantee. He referred to s. 10.09 of the guarantee which provided that the guarantors had agreed that the covenants, undertakings of the guarantors were irrevocable until the debenture had been discharged, the facilities terminated and all monies due thereunder had been paid in full. He said that the borrower still owed the amount claimed. He referred to s. 10.09 (i) which stated that:

...The guarantors shall not be discharged from any of their obligations and/or liabilities hereunder by any forbearance on the part of PCMB to sue the borrower or other(s) or to enforce any other remedy PCMB may have against the borrower or other(s) with regard to the said facilities ...

He submitted that how the bank dealt with the other securities did not concern the guarantors at all. He cited *China & South Sea Bank Ltd. v. Tan Soon Gin (Alias George Tan)* [1990] 2 WLR 56.

It is clear that the first defendant had still not paid the sum due and owing to the plaintiff. Mr. Manjit Singh said the plaintiff had earlier allowed the first defendant to sell its assets but subsequently refused to give its consent for the sale of the plant machinery. The plaintiff in its letter dated 4 October 1990 explained why it refused to give its consent for the sale of the two glove lines. According to the letter, the first defendant had not paid the plaintiff overdue interest in the sum of RM23,452.10 calculated as at 2 October 1990. The letter went over to state that:

settlement of the overdue interest shall not be in any case made out from the proceeds of the

a sale of the glove lines and/or any of the assets of the company, as all the sales proceeds shall be strictly applied towards the settlement of the principal ...

From the explanation given in the plaintiff's letter, I think the plaintiff was justified in refusing the sale of the machinery assets.

b With regard to the guarantors, they are still bound by the terms of the guarantee. The plaintiff owed no duty to the guarantors how it dealt with the other securities. In *China & South Sea Bank Ltd v. Tan Soon Gin (Alias George Tan)* [1990] 2 WLR 56, the Privy Council decided, on an appeal for the Court of Appeal of Hong Kong, that the creditor owed no duty to the surety to exercise its power of sale on the mortgaged securities and could decide in its own interest whether to sell and when to do so. At pp. 59 and 60, the Privy Council said:

c In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgaged securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise his power of sale over the mortgaged security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor.

For the reasons stated above I am satisfied that there are no triable issues in this case. The defendant's appeal is therefore dismissed with costs.

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